BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JON GREG BOYD Claimant VS. **RYANS FAMILY STEAK HOUSES, INC.** Respondent AND **ACE AMERICAN INSURANCE CO.** Insurance Carrier	)	Docket No. **1,035,380**

ORDER

Claimant requests review of the November 21, 2007 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

The Administrative Law Judge (ALJ) determined that claimant's accident date was the last day he worked and that claimant did not give timely notice within 75 days of the accident pursuant to K.S.A. 44-520.

The claimant requests review of whether the ALJ erred in denying claimant benefits due to lack of timely notice.

Respondent argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

At the preliminary hearing, claimant alleged a series of accidents occurring each and every working day after February 19, 2007, through March 5, 2007, which caused and progressively worsened a hernia condition. Respondent denied claimant suffered a work-related injury and further denied timely notice. It was undisputed that claimant's last day

worked was March 5, 2007. The ALJ determined that claimant's last day worked was the date of the accident and that claimant did not provide respondent notice that the hernia was work-related until June 7, 2007. As this was beyond 75 days from the date of accident the ALJ concluded claimant had failed to provide timely notice and denied the claim.[1]

Claimant was initially employed as a meat carver on January 20, 2004. He later worked as a grill cook which required lifting boxes of pork or beef weighing from 10 to 80 pounds. Claimant first noticed pain in his abdomen in January 2007 and then it gradually got worse. In February 2007 claimant made an appointment with his personal physician, Dr. Alberto F. Carro, who diagnosed a right side hernia. Claimant testified that at the time of his diagnosis he did not realize that the condition was work related but he told his employer that he was to have surgery to repair the hernia.

William McLaughlin, respondent's general manager, testified that he had asked claimant whether he had hurt himself at work when claimant had requested time off for the hernia surgery. Mr. McLauglin stated the claimant had denied he had hurt himself at work. Claimant conceded that he had not considered the condition related to work until June 7, 2007, when he finally made the connection after a discussion with his doctor. On that same day claimant provided respondent notice that he had suffered a work-related accident.

This Board member finds that claimant, as is the case with many unsophisticated workers, was unaware that he was suffering a series of injuries each and every day he continued working. But Dr. Carro's uncontradicted opinion established that claimant suffered a hernia at work which progressively worsened due to his continual lifting of heavy objects.

K.S.A. 44-508(d) was amended by the Kansas legislature effective July 1, 2005. The definition of accident has been modified, with the date of accident in microtrauma cases being now defined by statute rather than by case law. The new date of accident determination is as follows:

> (d) 'Accident' means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. **In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work**

[1] See K.S.A 44-520

> **which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing.** Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.[2] (Emphasis added.)

K.S.A. 2006 Supp. 44-508(d) offers a series of possible "accident dates" for a repetitive trauma injury dependent upon a case-by-case determination of which of the alternative factual situations established by statute have occurred.

In the instant case, claimant was never restricted nor taken off work by an authorized physician. Absent those facts, the next possible accident date is the earliest of either the date of claimant's receipt in writing of notification that his condition was diagnosed as work related or the date he gave written notice of the injury to the employer. There is evidence claimant's attorney received written notification from claimant's physician on June 7, 2007, that claimant's condition was diagnosed as work related and that claimant then provided notice to the respondent that same day. Consequently, under the plain language of the statute, claimant's date of accident is June 7, 2007, and notice was timely for the series of microtraumas occurring through his last day worked.

This date of accident creates the result of having a date of accident after the last date claimant worked. A majority of Board members have concluded that such a result does not contradict the plain language of the statute. When dealing with injuries that are caused by overuse or repetitive microtrauma, it can be difficult to determine the injury's date of commencement and conclusion. However, the date of accident dispute traditionally hinges upon situations where claimants have undergone microtrauma injuries over a period of days, weeks or months, with the determination of the date of accident being a legal fiction, rather than a specific traumatic event.

Case law established the legal fiction of a single accident date in order to determine what law would apply to the claim, as well as whether timely notice or written claim was provided. But this does not mean that the injury, in fact, occurred on only one day. Under the statute, a claimant can receive medical treatment before the date of accident, as treatment may be undertaken well in advance of claimant receiving written notice that the condition is "diagnosed as work related." Again, a single date of accident for a repetitive trauma injury is simply a legal fiction. And the fact that the date may be after the last day

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[2] K.S.A. 2006 Supp. 44-508(d).

worked or the employment relationship terminated is not prohibited by the statute. To the contrary, the only prohibition is against the date of accident being the date of or the day before the date of the regular hearing.

In any event, the claimant must still meet the burden of proof that the injury arose out of and in the course of employment. That fact alone should allay any concerns that the determination of an accident date after the last day worked or at a time when the injured worker was no longer employed leads to an unreasonable result.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[3] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[4]

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge John D. Clark dated November 21, 2007, is reversed and this matter remanded to the ALJ for further proceedings consistent with this Order.

IT IS SO ORDERED.

Dated this _____ day of February 2008.

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HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: Gary E. Patterson, Attorney for Claimant
Heather A. Howard, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge

[3] K.S.A. 44-534a.

[4] K.S.A. 2006 Supp. 44-555c(k).